JD-42-05
Schenectady, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALDI ELECTRIC, INC.

and Case No. 3-CA-24332

LOCAL 236, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Al Norek, Esq., for the General Counsel.
Nathan Goldberg, Esq., for the Respondent.[1]
William Pozefsky, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Albany, NY, on April 25, 2005, following the filing of an unfair labor practice charge by Local 236, International Brotherhood of Electrical Workers, AFL-CIO (the Union or Local 236) on July 15, 2003, and amended on July 22, 2003, and issuance of a complaint by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on December 11, 2003.[2] The complaint alleges that the Respondent, Aldi Electric, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully interrogating, threatening, and soliciting employees, and violated Section 8(a)(3) and (1) by ceasing to assign alleged discriminatee Kim Kiefner (K. Kiefner) to prevailing wage rate jobs, and by thereafter discharging K. Kiefner, and alleged discriminatees Diane Kiefner (D. Kiefner),[3] Patrick Dunn, and Francis Goodsill for their union activities.[4] By answer dated December 26, the Respondent denies engaging in any unlawful conduct.

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[1] Nathan Goldberg appeared at the hearing as the Respondent's trustee in bankruptcy. The Respondent filed a Chapter 7 petition for bankruptcy on April 4, 2005 (see GCX-2[a]). At the start of the hearing, Goldberg sought to have the matter postponed under the automatic stay provisions of the U.S. Bankruptcy Code. The trustee's request to stay the Board's proceedings was denied on grounds that "the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition." *Bristol Nursing Home,* 338 NLRB 737, fn. 1 (2002); *Accurate Die Casting Company*, 292 NLRB 982, 987 (1989). Following the denial of his request for a stay or a postponement, trustee Goldberg excused himself and left the hearing. Other than this brief appearance by its trustee, the Respondent was unrepresented at the hearing. Accordingly, the only evidence produced at the hearing was that presented by the General Counsel. Reference to exhibits submitted by the General Counsel into evidence are identified as "GCX" followed by the exhibit number.

[2] All dates are in 2003, unless otherwise indicated.

[3] D. Kiefner is the mother of K. Kiefner.

[4] By Order of the Regional Director dated February 12, 2004, allegations contained in paragraphs VI, VII, and XIII of the complaint were withdrawn

All parties were afforded a full and fair opportunity to call and examine witnesses, to present oral and written evidence, to argue orally on the record, and to file post-hearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a New York corporation with a principal office and place of business in Schenectady, New York. From its Schenectady facility and at various other jobsites, the Respondent has been engaged as an electrical contractor in the building and construction industry, including the Stratton Air Force Base in Scotia, NY, and the NY State Department of Environmental Conservation in Olive, NY. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, has provided services valued in excess of $50,000 to enterprises located with the State of New York, including Cowbay Contracting and Integrated Construction Enterprises, which businesses are directly engaged in interstate commerce. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Factual background

Alleged discriminatee Dunn began working as an electrician for the Respondent on May 19. Dunn, a member of Local 236 since June 2002, and apparently unemployed prior to May 19, first learned that the Respondent was hiring from a help-wanted ad shown to him by Local 236 representative Joseph Hlat. Dunn testified that he was interviewed for the job by Respondent's president and owner, Mike Aldi, Jr. (herein Aldi, Jr.), an admitted supervisor.[5] Aldi, Jr., during that interview, told Dunn he would be starting at $15/hour, and would go up to $19/hour after a 30-day probationary period. As an electrician with the Respondent, Dunn did light commercial work at storefronts, public libraries, etc., and, at times, worked on "prevailing wage" jobs that regularly paid around $36./hour. He testified, however, that the Respondent did not always pay him the prevailing rate on such jobs. Dunn claims that he had, at times, confronted Aldi, Jr. about not being paid the prevailing rate.

Hlat testified that on July 3, K. Kiefner and several of the Respondent's other employees (Pete Goodsill, Jason Hollenbeck, Brian Sweet, Mike Faga, Sunil Rai) came to the union hall in Schenectady, NY wanting to speak with a union representative. Hlat, along with fellow union representative, Michael Doyle, met with the six employees. Hlat testified that the employees complained to them about being mistreated on the job by the Respondent, not being paid the

[5] In its answer to the complaint, the Respondent denied that Aldi, Jr. is owner of the Respondent, but admits that he is Respondent's president and a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act. However, I take judicial notice of the fact that in an earlier 1999 proceeding before Judge Rosenstein, the latter, inter alia, found that Aldi, Jr. was owner of the Respondent. No exceptions were filed to the Judge Rosenstein's decision in that matter, which was subsequently affirmed in an unpublished Order by the Board dated March 16, 1999. (See, GCX-3).

proper rate for work they had done on "prevailing wage" jobs, working 40 hours per week but getting paid only for 30 hours, and having to pay for use of the company vehicle when working at a jobsite. They told Hlat and Doyle that they wished to be represented by the Union, and Hlat then distributed applications and authorization cards to them to fill out. Copies of the authorization cards filled out by the six employees that day were received into evidence as GCX-6.

Later that same day, Hlat and Doyle went to the Board's regional office and filed a petition for a representation election seeking to represent "all full-time and regular part-time electricians and electrician/helper/apprentices employed by the Respondent, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act. (GCX-7[a]) The Union subsequently withdrew the petition after filing the charge in this case.

Dunn testified that Aldi, Jr. held meetings every morning with employees to make work assignments and to discuss what would be happening that day. At one such meeting held on July 7, at the Respondent's Schenectady facility, Dunn asked Aldi, Jr. about his evaluation which was overdue, and whether Aldi, Jr. was satisfied with his work. Aldi, Jr. told Dunn he had been busy and not had time to do his evaluation, but that he was satisfied with Dunn's work. Dunn then mentioned to Aldi, Jr. that he was a member of the Local 236, and enjoyed working with Aldi, Jr., and hoped they would be able to maintain their ongoing working relationship. Dunn testified that this was the first time he ever disclosed his union affiliation to Aldi, Jr., and that he had not given any indication of his union membership on his job application.

Two days later, on July 9, Dunn was standing in front of Respondent's office, along with K. Kiefner and Goodsill, and Michael Aldi, Sr. (herein Aldi, Sr.),[6] when the latter asked Dunn why he was trying to tear up his son's business. Aldi, Sr. then invited Dunn to go deer hunting with him. Dunn testified that, given Aldi, Sr.'s demeanor at the time, he perceived Aldi, Sr.'s invitation to go deer hunting as a threat. Dunn recalls that during that week, he and K. Kiefner were sent to a Wal-Mart store to do some electrical repair work, and also worked on other assignments.

On July 11, when he reported to the office, Dunn was met by Aldi, Jr. and given a letter notifying him that he was being terminated effectively immediately for poor work performance. Specifically, the letter points out that at the Wal-Mart jobsite, Dunn had not properly attached conduit wires, and at a prior jobsite at a Saratoga Golf Course, he had improperly wired a security panel. (GCX-8). The letter goes on to state that "these unsafe wiring practices require us to terminate your employment."

Regarding the Wal-Mart job, Dunn testified that he and K. Kiefner actually were sent there to install fix an electrical panel that had become loose. He testified that he believes, but could not be sure, that he was not the one who installed the panel in the first place. As to the Saratoga Golf Course job, Dunn testified that employee Sweet, not he, actually did the repair work at that facility, and that he has never been issued a warning for the work done there. Nor had he, prior to being issued the dismissal letter, received any complaints from Aldi, Jr. or anyone else about the work done at the Wal-Mart jobsite, or regarding his overall work performance. Indeed, according to Dunn, just a few days earlier, on July 7, Aldi, Jr. had expressed satisfaction with Dunn's overall work performance, a claim that, as shown below, was corroborated by other employees.

[6] Aldi, Sr. is Aldi, Jr.'s father and an employee of the Respondent.

Goodsill began working for the Respondent as an electrician in February 2003, after responding to a help-wanted ad.[7] Like Dunn, he was interviewed by Aldi, Jr., and was told he would be starting at $15/hour and go up to $19/hour after a 30-day probationary period. His salary did in fact go up to $19/hour but after about 45 days. Goodsill recalls signing an authorization card for the Union and recognized a copy of a card containing his name and signature on GCX-6 as the one he signed. Goodsill testified that during the month of July, he was working at a prevailing wage job at the DEC State Park Police building in Olive, NY. The initial wage rate for that job was $36.95/hour, which, after a few weeks, jumped to $44/hour. He subsequently learned that the real rate should have been $50.92/hour. According to Goodsill, he was never compensated for the period of time he did not receive the correct rate, and that that amount is still owed to him. (Tr. 43).

Goodsill recalled being present at the morning meeting held by Aldi, Jr. on July 7, and, as testified to by Dunn, recalls the latter asking Aldi, Jr. about his evaluation. He recalls Aldi, Jr. telling Dunn that he was a little busy at the moment and did not have time to do his review, but that he viewed Dunn to be a good employee and that Dunn was doing great work. Goodsill further recalls Dunn telling Aldi, Jr. that he was a member of Local 236. According to Goodsill, after Dunn left the office, Aldi, Jr. "lost it" and remarked, "I got to find a way to fire this rat," but that, having just praised Dunn's work, he "had to find a way to get around that." Goodsill recalls that employees Hollenbeck, K. Kiefner, Sweet, and D. Kiefner were present when Aldi, Jr. made his remarks.

Goodsill testified that on July 8, while at the Olive jobsite, Aldi, Jr. approached him and, in a private conversation, asked if Goodsill could find out who had "signed union cards so that he could get rid of the rats, [that] he didn't want them to strike the company." Goodsill claims that Aldi, Jr. had no reason to suspect that he had signed a union card himself and trusted him. Aldi, Jr. further mentioned to Goodsill that the Department of Labor was looking into his business records and timesheets, and that if he, Goodsill, were asked by investigators why some of his timesheets had been changed, Goodsill was to tell them that he, Aldi, Jr. had merely corrected some errors on his (Goodsill's) timesheets. Goodsill agreed to do so.

According to Goodsill, on July 9, as he and other employees were milling around outside the front office taking a smoke break and waiting for their assignments, Aldi, Sr. came out and appeared to be "pissed off." He recalls Aldi, Sr. confronting Dunn and asking him, "Why are you doing this to my son, why are you trying to destroy his business? It's "assholes" like you that I would like to take to my deer hunting camp to go hunting. Why don't you come up with us?"

Also on July 9, while he was working at the Olive jobsite, Goodsill received a call from Aldi, Jr. inquiring as to the whereabouts of a particular tool, known as a "knockout" set, used for creating holes in electrical panels. Goodsill recalls that the tool had been brought to the Olive jobsite by employee Rai. Following Aldi, Jr.'s call, Goodsill placed the tool in the back of his truck and drove back to the Respondent's facility which was some two hours away from the jobsite. As the office was closed by the time he arrived, Goodsill took the tool home with him and, the next morning, on reporting for work, placed the tool in the Company tool room. He claims that while employees are generally required to sign a log book whenever they remove a tool from the tool room, the practice was generally ignored. He explained in this regard that because there was only one "knockout" set, employees often passed the "knockout" set around to others for use on different jobsites without returning it to the tool room to be checked out by

[7] Goodsill actually applied for a position as foreperson, but testified that no such positions were in fact available (GCX-9).

the next user.

On Sunday, July 13, Goodsill received a phone call from Aldi, Jr., informing him that there was to be a meeting the following Monday morning, July 14, and that Goodsill was to bring all the paperwork he had relating to the Olive jobsite with him. When he finished speaking with Aldi, Jr., Goodsill tried calling K. Kiefner to notify him of the meeting, but somehow mistakenly dialed Aldi, Jr.'s number. Aldi, Jr. then asked Goodsill why he was calling, and the latter replied that he was simply calling K. Kiefner and the other employees to tell them of the meeting. Aldi, Jr., Goodsill claims, responded that he did not have to call K. Kiefner because the latter had been fired for stealing company property, and that his mother, D. Kiefner, had also been terminated. Aldi, Jr. then told him that he did not need to contact any of them and to just bring all his paperwork to the office the following morning.

Goodsill testified that, at the July 14, meeting, as they were discussing the Olive jobsite, Rai stated that he would be needing the "knockout" tool set at another jobsite that day, but did not find the set in the tool room. When Aldi, Jr. asked Goodsill about the "knockout" set, Goodsill answered that he had returned it to the tool room a few days earlier and did not know who had it. Goodsill claims that an argument between the two thereafter ensued, after which Aldi, Jr. fired him, accusing him of stealing company property. After being told he was terminated, Goodsill mentioned to Aldi, Jr. that he was one of the employees who had signed a union authorization card. Aldi, Jr., he contends, then called him a "rat" and other names, threatened to destroy Goodsill's political career, and commented that he could not believe that "a fellow Republican" had done this to him. Goodsill claims he did not understand what Aldi, Jr. was referring to because he, Goodsill, was a Democrat, not a Republican.

Goodsill testified that about a week later, he received a letter from Aldi, Jr., dated July 14, notifying him of his termination due to Goodsill's "substandard job performance" and Aldi, Jr.s' "lack of trust in [his] ability to protect company property." (GCX-10). The letter states that Goodsill had been hired as a manager, "as a foreman with hiring and firing responsibility and with the responsibility to ensure that jobs ran smoothly and properly." It also accused Goodsill of either losing or stealing the "knockout set," and advised that the Respondent intended to take appropriate action regarding its loss of this equipment, and that Goodsill's final paycheck was being withheld until he returned the tool or reimbursed the Company for it. Finally, the letter explains that due to Goodsill's "inability to perform supervisory and management tasks, and costs overruns incurred by [the Respondent] resulting from [his] mismanagement of the Olive job, [Goodsill's] employment is hereby terminated, effective July 14, 2003." Goodsill denied that he was hired as a manager or foreman, or having had the authority to hire, fire, to direct other employees, or possessing any other indicia of supervisory authority. He also denied stealing the Respondent's "knockout" set.

K. Kiefner began working as an electrician with the Respondent in July 2001. He had known the Aldi family for many years as he lived down the road from them and knew Aldi, Jr. since they were in grade school together. He began earning $19/hour, but some two months before being terminated on July 13, had his salary reduced to $17/hour. Aldi, Jr., he contends, told him that the reason for the reduction was that he had better qualified electricians and that K. Kiefner would now be doing service calls in the Company's service vehicle. K. Kiefner testified that after his reduction in pay, he began receiving assignments on prevailing wage rate jobs, one of which was at the EC building in Olive, NY, the job he was working on when he got fired.

K. Kiefner testified to being present at the Union hall with other employees on July 3, and signing an authorization card. He explained that before they went to the Union hall, employees had gotten together to express their dissatisfaction with the way they were being

treated by the Respondent, and the fact that they were not being fully paid for the work performed. K. Kiefner recalled attending a July 7, meeting during which Dunn asked Aldi, Jr. about his performance and Aldi, Jr. telling Dunn that he was doing a good job. He further recalled hearing Dunn commenting to Aldi, Jr., as they were leaving the office that day, that he, Dunn, had become a member of Local 236, and Aldi, Jr. "blowing up." He contends that Aldi, Jr. then remarked, "somehow I have to find a way to fire this guy because I cannot get rid of him because he's a union member and they will file charges against me if I just fire him without a reason." (Tr. 65).

K. Kiefner testified that Aldi, Sr. is referred to as "Pops" by other employees, and that "Pops" often gets the easier jobs and simply "just putters around." He testified that on July 8, while at an Air National Guard jobsite, employee Rai remarked that he had just told "Pops" that he, Rai, had signed a union card, stating that he had nothing to hide. K. Kiefner told Rai that he too had nothing to hide and would likewise mention to Aldi, Sr. that he also had signed a card. A short while later, presumably before K. Kiefner had a chance to reveal his union affiliation to Aldi, Sr., the latter approached him and asked if he had signed a union card. K. Kiefner said he had, and Aldi, Sr. then remarked that if he, K. Kiefner, had a problem with his son, Aldi, Jr., he should have confronted the latter about the problem and not run to the Union hall.

On July 13, Aldi, Jr. and Aldi, Sr. went to the Kiefner residence. When K. Kiefner opened the door, Aldi, Jr. informed him he was fired and that he had come by to pick up the company truck and the company cell phone. Aldi, Jr. then asked how K. Kiefner could do this to him, that he had known K. Kiefner for a long time. Aldi, Jr. purportedly went on to say that if he, K. Kiefner, did not tell the Union Hall to back down, and the Labor Department that the corrections on K. Kiefner's timesheets were done to fix errors the latter had made, he, Aldi, Jr, would press charges against K. Kiefner for stealing company property. Soon thereafter, D. Kiefner came to the door and told Aldi, Jr. not to threaten her son, at which point Aldi, Jr. told her she too was fired. (Tr. 67). K. Kiefner testified that prior to his termination, Aldi, Jr. had expressed satisfaction with his work, and that he had never before been disciplined by the Respondent. He further claims that he had never before heard Aldi, Jr. complain about missing equipment or materials, or been accused him of taking equipment without authorization.

Some two weeks after K. Kiefner was discharged, State troopers came to his home with a search warrant and searched the premises but found nothing. Some three to four months later, State troopers again came to his home and arrested him for grand larceny based on complaint filed by Aldi, Jr. on July 15.[8] Following a jury trial held in August, K. Kiefner was acquitted of all charges. K. Kiefner denies possessing and/or exercising any supervisory authority during his employment with the Respondent.

D. Kiefner was hired by Respondent in February, after being referred by a friend who told her Aldi, Jr. was looking for someone to help him with bids, blueprints, etc. Her duties included taking data from timesheets completed by employees and entering it into the Respondent's computer, preparing a spreadsheet of such information for Aldi, Jr., and making whatever adjustments to the timesheets Aldi, Jr. felt were needed. She recalls that in late June, the Respondent received a fax from the Department of Labor advising that they would be coming out to review the Company's records. D. Kiefner claims that on receipt of the fax, Aldi, Jr. asked her to go over the timesheets and make certain changes, and that she declined to do so. On July 3, D. Kiefner received by fax a copy of the representation petition and called Aldi,

[8] The criminal complaint accused K. Kiefner of stealing wire and conduit from the Respondent. (see GCX-11).

Jr. to advise him of it. Aldi, Jr. instructed her to fax the petition to the Company's attorney. Later that day, when Aldi, Jr. arrived at the office, D. Kiefner gave him the copy of the petition. On receipt of the petition, Aldi, Jr. remarked that anyone involved with the petition would be fired. (Tr. 83).

D. Kiefner was present at the July 7, morning meeting, and testified that she heard Dunn ask Aldi, Jr. about his evaluation, and Aldi, Jr. respond that he had not yet prepared the evaluation, but that he, Dunn, was doing a "great" job. She recalls Dunn then telling Aldi, Jr. that he was a union member, and Aldi, Jr., "blowing up" after Dunn had left. Finally, she recalled that once Dunn left the office, Aldi, Jr. stated, "I'm going to get him fired, but I got to do it in a way where he (Aldi, Jr.) won't get in trouble," because, by law, he could not just fire Dunn for his involvement with the Union. (Tr. 84).

D. Kiefner recalls having a conversation with Aldi, Jr. on July 10, about her son, K. Kiefner, being in the Union. According to D. Kiefner, that day, Aldi, Jr. called her into his office and commented that he was upset with K. Kiefner because he had known the latter since he was a child. Aldi, Jr. then began asking her questions about her son, and D. Kiefner, at one point, told Aldi, Jr. that he should question K. Kiefner if he had a problem with the latter. Aldi, Jr. remarked that "anybody who is involved in this will be fired, and I'll just find a way to fire them." D. Kiefner then asked if she should be looking for another job, and Aldi, Jr. replied, "No," but did ask D. Kiefner if she knew anything about employees going the Union or the labor board. D. Kiefner replied that she did not. She did recall Aldi, Jr. commenting that he was going to fire Dunn and use the excuse that Dunn had done a poor job at a Greenwich Library jobsite. She purportedly remarked that if Dunn was incapable of doing the work, why was Dunn repeatedly being sent out to jobs by himself. Aldi, Jr. replied that he was just looking for a way to fire Dunn and anyone else associated with the Union. D. Kiefner testified that she had never before heard that Aldi, Jr. was dissatisfied with Dunn's, Goodsill's, or her son's work. D. Kiefner also recalls that during this same conversation, Aldi, Jr. also mentioned that he had reduced K. Kiefner's pay from $19/hour to $17/hour, and would no longer put him on prevailing wage jobs because he believed K. Kiefner was "involved" with this matter, implicitly referring to the Union.

On Friday, July 11, D. Kiefner woke up late and called the office to inform another employee, Dawn Horn, that she would be arriving a little late. Horn, however, told her that Aldi, Jr. had instructed that she should not bother to come in at all. When she asked for an explanation, Horn simply told her she was relaying a message from Aldi, Jr., at which point D. Kiefner asked Horn to tell Aldi, Jr. to call her. Aldi, Jr. did not call her back. K. Kiefner testified, without contradiction, that she had never before missed a day of work with the Respondent.

D. Kiefner testified, consistent with K. Kiefner's testimony, that on July 13, Aldi, Jr. and Aldi, Sr. showed up at her house. While there, she overheard Aldi, Jr. accuse her son of stealing certain things from the Company. According to D. Kiefner, Aldi, Jr. came across as very intimidating. At one point during Aldi, Jr.'s accusation, she came over to K. Kiefner and told him not to let Aldi, Jr. intimidate him, and Aldi, Jr. then turned to her and said, "Well, you're fired too." When she asked why she was being fired, Aldi, Jr. answered that it was for not showing up to work on Friday. D. Kiefner replied that she had called in to the office, but Aldi, Jr. then stated that she was being fired because he couldn't trust her. When D. Kiefner asked for an explanation, Aldi, Jr. brought up the fact that she had shown employees their timecards, a fact not denied by D. Kiefner. D. Kiefner protested that she had simply shown employees their own timecards, but Aldi, Jr. replied, "Well, you're fired anyway." (Tr. 89). She contends that at no time prior to her discharge did Aldi, Jr. voice any dissatisfaction with her work, or express concern about missing equipment or materials.

In a July 28, letter sent to D. Kiefner, Aldi, Jr. informed her that she had been terminated effective July 11, for violating Company policy prohibiting employees from using company materials and/or company time for their personal use. (GCX-12). The letter states that when she failed to report for work on July 11, Aldi, Jr. went through the items on her desk to see if there were any business matters that needed to be addressed in D. Kiefner's absence. Aldi, Jr. states in the letter that while looking through her desk, he came across a piece of Company stationary with the Company letterhead "whited" out, on which D. Kiefner had written a letter seeking a job interview with another firm. D. Kiefner's resume was apparently attached to the letter. Aldi, Jr. accused D. Kiefner in the letter of using the Company computer, and its e-mail address, for personal matters, and notified her that because of her "willful disregard for company policy, continuation of your employment was no longer possible."

D. Kiefner admitted preparing a personal fax on Company stationary responding to a job ad, but testified she never actually sent it because Aldi, Jr. assured her she did not need to look for another job. She denied, however, using the Company's e-mail address for personal purposes, and testified that the only time she used the Company's AOL e-mail account was to communicate with other contractors to obtain information on jobs that the Respondent planned on working on. She admits that oftentimes the Company would receive junk e-mail and adult pop-ups in its e-mail but contends that it resulted from Aldi, Jr.'s use of the computer. She testified, without contradiction, that the Respondent had no policy prohibiting the personal use of Company materials, nor had any restrictions been placed on her by Aldi, Jr. on the use of the computer.

I credit D. Kiefner's undisputed testimony over the contrary and unsupported claims set forth in the July 28, letter, regarding the existence of a Company policy prohibiting the personal use of Company materials and computers. Thus, no documentary or other evidence was produced at the hearing contradicting her claim or suggesting the existence of any such policy or restriction. I also credit D. Kiefner's testimony that she was first notified of her discharge on July 13, when Aldi, Jr. came to her house to fire her son, K. Kiefner.

Rai, one of the six employees who signed authorization cards at the Union hall on July 3, did not testify. However, at the hearing, the General Counsel produced and offered into evidence, without objection, a portion of deposition testimony given by Rai on July 21, 2004, at a New York State correctional facility. Rai was being held at the correctional facility on an immigration violation and awaiting deportation. The deposition was taken pursuant to a July 12, 2004 written request to the Regional Director from Michael Avakian, Esq., who was, at the time, the Respondent's legal counsel, in order to preserve Rai's testimony before his July 19, 2004, deportation date (see GCX-17).[9] In his deposition, Rai admits signing a union authorization card on July 3, along with Hollenbeck, Sweet, K. Kiefner, Goodsill, and Faga, and subsequently telling Aldi, Jr., following an inquiry by the latter, that he and the others had signed such cards for the Union. (GCX-18). According to his deposition, Rai could not recall when Aldi, Jr. questioned him about the Union or when he might have told Aldi, Jr. of the card signing by other employees, and stated only that he believes it may have occurred a few months after the cards

[9] In his letter to the Regional Director, Avakian avers that the taking of Rai's sworn testimony was necessary for the Respondent's case in this matter because Rai was expected to testify that K. Kiefner stole equipment from the Respondent, and that he and "other former Aldi employees alleged in the complaint had engaged in fraudulent time card practices that Aldi later learned of and which became a basis for their discharges." Thus, according to Avakian's letter, the Respondent's explanation, as of July 12, 2004, for why K. Kiefner, D. Kiefner, Dunn, and Goodsill were terminated was because they had "engaged in fraudulent time card practices."

were signed, or sometime in late summer of 2003.

Given the uncertainty expressed by Rai in his deposition as to when he might have informed Aldi, Jr. that he and the others had signed union cards, I do not believe that it occurred a few months after the cards were signed, as vaguely suggested by Rai. Rather, I find it more likely than not that such disclosure occurred more closely in time to when the cards were signed and, more specifically, on or around July 8, when Aldi, Jr. asked Goodsill to find out who had signed cards so that he could get rid of the "rats." On that day, as noted, Rai, according to K. Kiefner, told Aldi, Sr. that he had a union card. Further, that same day, Aldi, Sr. asked K. Kiefner if he had signed a card, and when the latter admitted he had, told K. Kiefner that he should not have run to the Union but, instead, should have raised any concerns he might have had with his son, Aldi, Jr. As more fully discussed and found infra, Aldi, Sr. was at all times relevant herein an agent of the Respondent.

B. Discussion

1. The alleged Section 8(a)(1) violations

a. Aldi, Jr.'s July 7 threat

The complaint alleges that on July 7, the Respondent unlawfully threatened to discharge an employee for his union activities. The record supports the allegation. Thus, the undisputed testimony by Goodsill, K. Kiefner, and D. Kiefner show that following the morning meeting held on July 7, at Respondent's office, Aldi, Jr., and upon learning from Dunn that the latter had become a Union member, called Dunn a "rat" and expressed his intent to get rid of Dunn but in such a way as to avoid the appearance that it was somehow related to his union activity. Aldi, Jr.'s remark, made in the presence of other employees, was neither ambiguous nor vague. Employees could not have mistaken Aldi, Jr.'s remark as anything other than a threat to retaliate against Dunn for his decision to join the Union. As such, Aldi, Jr.'s threat to discharge Dunn for his union activity would reasonably have coerced employees into refraining from engaging in any similar union activities for fear of incurring Aldi, Jr.'s wrath and subjecting themselves to the possibility of being discharged. Accordingly, Aldi, Jr.'s July 7, threat to discharge Dunn was coercive and a violation of Section 8(a)(1) of the Act.

b. Aldi, Jr.'s July 8, interrogation

The complaint alleges that Aldi, Jr.'s query to Goodsill at the Olive jobsite on July 8, if he could find out who had signed union cards so he could get rid of them, amounted to an unlawful interrogation. In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Toma Metals, Inc.*, 342 NLRB No. 78 (2004), relying on *Rossmore House*, 269 NLRB 1176 (1984); also, *The Kroger Company*, 342 NLRB No. 20 (2004); *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). Among the relevant factors considered by the Board in making this assessment are the presence or absence of employer hostility to the Union, whether the employer appears to be seeking information on which to base disciplinary action, the position of the questioner in the employer's hierarchy, the place and method of interrogation, and the truthfulness of the employee's reply. *Id.* These factors, however, are not to be mechanically applied, nor must each factor be evaluated to find that an unlawful interrogation has occurred. *The Kroger Company*, supra.

Clearly, the question posed to Goodsill by the Respondent's highest official, e.g., its president and owner, was intended to get Goodsill to divulge what he knew about employee

union activity and/or to get him to find out which employees had signed union cards so that he, Aldi, Jr. could terminate them. Such an inquiry by the Company's highest official, for the sole purpose identifying and purging from its employee roster those identified as union supporters, was clearly coercive and unlawful under *Rossmore House*, and the other cases cites, supra. Accordingly, I find that the Aldi, Jr.'s July 8, query to Goodsill constituted an unlawful interrogation and violated Section 8(a)(1) of the Act.

c. Aldi, Jr.'s July 10 statements

It is further alleged in the complaint, and I agree and find, that on July 10, Aldi, Jr. also unlawfully interrogated another employee about the union activities of other employees. Thus, on that day, according to D. Kiefner's undisputed testimony, Aldi, Jr. questioned her about her son's activities, and further asked if she knew anything about employees going to the Union or to the Board. Like the Goodsill interrogation, this questioning of D. Kiefner was undertaken by the Respondent's highest official, Aldi, Jr., and pertained to the union activities of other employees. Given his interrogation of Goodsill just two days earlier, it is reasonable to assume that Aldi, Jr.'s purpose in seeking such information from D. Kiefner was to ascertain what she knew of employee union activity at the facility in the hopes that she might be able to identify the union supporters to him. As Aldi, Jr. did not testify, no explanation was proffered to explain why Aldi, Jr. sought such information from D. Kiefner. Given the totality of the circumstances in which the questioning of D. Kiefner occurred, said questioning was, I find, clearly coercive and a violation of Section 8(a)(1) of the Act.

I also find that in further telling D. Kiefner on July 10, that anyone involved in this matter would be fired, Aldi, Jr. was in fact declaring his intent to fire any employee who became involved with the Union. The remark, I find, was coercive in that D. Kiefner could reasonably believe that her son might very well be fired for having signed a union card. Accordingly, as alleged in the complaint, Aldi, Jr.'s remark constituted an unlawful threat of discharge and violated Section 8(a)(1) of the Act.

In addition to the above unlawful interrogation and threat directed at D. Kiefner, Aldi, Jr., as evident from D. Kiefner's uncontroverted testimony, also told the latter during their July 10, conversation, that her son's wage rate had been reduced from $19/hour to $17/hour, and that he would no longer be assigned to prevailing wage rate jobs, because of his involvement with the Union. This threat to reduce K. Kiefner's job opportunities, e.g., no longer sending him to work on prevailing wage jobs, because he supported the Union, was also coercive and violated Section 8(a)(1) of the Act.

d. Aldi, Jr.'s solicitation of employee

On July 13, Aldi, Jr, and his father, Aldi, Sr. went to the Kiefner residence to notify K. Kiefner that he was being fired. While there, Aldi, Jr., as previously discussed, asked how K. Kiefner could do this to him since they had known each other for so long, and then asked K. Kiefner to tell the Union to back down or he, Aldi, Jr., would press charges against him for stealing Company property. This attempt by Aldi, Jr. to solicit K. Kiefner into getting the Union to back down in its organizing efforts under threat of arrest was clearly coercive and unlawful, and a violation of Section 8(a)(1) of the Act.

e. Aldi, Jr.'s July 14, threat

As previously noted, on July 14, according to Goodsill's uncontradicted testimony, Aldi, Jr. fired him after which he notified Aldi, Jr. that he too had signed an authorization card for the

Union. On hearing this, Aldi, Jr. called Goodsill a "rat" and threatened to destroy his political career. Clearly, Aldi, Jr.'s name-calling and threat directed Goodsill came on the heels of, and in direct response to, the latter's admission of being Union supporter. I find that the threat to destroy Goodsill's career because of the latter's involvement with the Union was unlawful and a violation of Section 8(a)(1) of the Act.

f. Aldi, Sr.'s alleged threats

The complaint alleges that the Respondent unlawfully threatened Dunn on July 9, when Aldi, Sr. asked Dunn why he was trying to tear up his son's business, and then invited Dunn to go deer hunting with him. The General Counsel contends that these alleged threats by Aldi, Sr. are attributable to the Respondent because Aldi, Sr. was serving as agent of the Respondent when he made the remarks. I find merit in the General Counsel's contention.

The Board has held that "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Property Markets Group*, 339 NLRB 199, 206 (2003); *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). The burden of proving the existence of an agency relationship is on the party asserting the claim.[10] *Pratt Towers, Inc.*, 338 NLRB 61, 72 (2002); *Pan-Oston Company*, 336 NLRB 305, 306 (2001); *Jackson Engineering Co.*, supra. In determining whether an individual meets the definition of an agent, common law rules of agency apply. *Feldkamp Enterprises, Inc.*, 323 NLRB 1193, 1196 (1997). Under the doctrine of apparent authority, an agency relationship exists where a principal supplies a third party with a reasonable basis to believe that the alleged agent is authorized to do the acts in question. In this regard, the Board has often concluded that close family members, like Aldi, Sr. here, are cloaked in the mantel of apparent authority. *Id*.

As noted, Aldi, Sr. is the father of Aldi, Jr., the Company's president and owner, as well as an employee of the Company. Although referred to by Aldi, Jr. as an electrician, Aldi, Sr., according to Goodsill's unrefuted testimony, was actually a plumber by trade, not an electrician, whose job responsibilities, again according to Goodsill, involved nothing more than "puttering around" and "help[ing] out somewhat." Both Goodsill and Dunn testified that Aldi, Sr. got the nicer and easier jobs to do, noting, for example, that "if it was a cold day and there was one warm job and the rest were cold, you know who got the warm job," implicitly referring to Aldi, Sr. Further, Aldi, Sr., as noted, accompanied Aldi, Jr. to the Kiefner residence for the purpose of notifying K. Kiefner of his termination. It is highly unlikely that Aldi, Jr. would have taken Aldi, Sr. with him to effectuate the discharge if the latter had been a mere employee with no authority to speak on Respondent's behalf. This fact, coupled with the preferential treatment he received as an employee and his unique familial relationship to the Respondent's owner and president, leads me to conclude that Aldi, Sr. was at all relevant times herein, and from the employees' perspective, an agent of the Respondent with authority to speak and act on its behalf. Accordingly, I find that Dunn and Goodsill could reasonably have believed that Aldi, Sr. was conveying the sentiments of, and speaking for, Aldi, Jr. when he asked Dunn if the latter was trying to destroy the Company, and invited him to go deer hunting.

[10] Although the Respondent did not participate at the hearing, its answer denies that Aldi, Sr. is an agent of the Respondent. A respondent's failure to introduce evidence negating the imputations in the complaint does not relieve the General Counsel of that burden. *Jackson Engineering Co.*, 265 NLRB 1688, 1702 (1982).

Regarding the comments made by Aldi, Sr., I am convinced that he was referring to Dunn's involvement with the Union when he accused Dunn of trying to destroy his son's business. Further, Aldi, Sr.'s invitation to Dunn to go deer hunting with him, immediately after his accusation that Dunn was trying to tear up the Company, particularly when the two had never before engaged in such activity together, could reasonably have been perceived by Dunn and others who heard it as a not-so-subtle threat to cause bodily harm to Dunn for his union-related activity. In sum, I find, as alleged in the complaint, that Aldi, Sr. was indeed an agent of the Respondent when he made his July 9, remarks to Dunn, and that his invitation to Dunn to go deer hunting amounted to an unlawful threat and violated Section 8(a)(1) of the Act.

2. The Section 8(a)(3) and (1) conduct

a. Dunn's discharge

The complaint alleges that Dunn was unlawfully discharged for his union activities. Although the Respondent, as noted, did not participate at the hearing, GCX-8, the discharge letter issued to Dunn, states that he was discharged for poor work performance, e.g., doing improper wiring work at the Wal-Mart and Saratoga Golf jobsites.[11] Where, as here, the discharge of an individual turns on employer motivation, the Board applies the causation test established in *Wright Line*, 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403.[12] Under *Wright Line*, the General Counsel must make an initial prima facie showing that the employee's discharge was motivated, at least in part, by his involvement in union or other protected activity. The General Counsel can satisfy this initial burden by demonstrating that the employee was engaged in union or protected activity prior to being discharged, that the employer knew or was aware of such activity, that it harbored antiunion animus, and that said animus was a motivating factor in the decision. If the General Counsel succeeds in establishing a prima facie case, the burden then shifts to the employer to demonstrate that the same actions would have taken place in the absence of union or other protected conduct.

The General Counsel has made a strong prima facie showing that Dunn's discharge was motivated by antiunion reasons. Dunn, as noted, had been a member of the Union since before being hired by the Respondent on May 19. The record makes clear that Aldi, Jr. learned of Dunn's involvement with the Union before firing him, for Dunn personally revealed his association with the Union to Aldi, Jr. during the July 7, meeting. Aldi, Jr.'s immediate statement following Dunn's disclosure of his union involvement, that he now had to find a reason to fire Dunn, along with his unlawful interrogation of other employees, and threat to discharge any other employees who had signed union cards or who supported the Union, provide strong evidence of the Respondent's antiunion animus. On these facts, I find that the General Counsel has established, prima facie, that Dunn was indeed discharged for his union activity. The burden now shifts to the Respondent to demonstrate that Dunn would have been discharged even if he had not engaged in any union activity. No such showing has been made here by the Respondent.

The Respondent, as noted, was not represented at the hearing and, consequently,

[11] In its answer to the complaint, however, the Respondent avers as an affirmative defense that it had "nondiscriminatory economic reasons for laying off and disciplining its employees as alleged" (see GCX-1[g], affirmative defense No. 3).

[12] See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

presented no testimonial or documentary evidence of its own to explain why Dunn, or for that matter any of the other named discriminatees, was terminated. However, a review of the documents offered into evidence by the General Counsel shows that the Respondent has, at various times, given different reasons for its discharge decisions. As to Dunn, the Respondent, as evident from Dunn's discharge letter (GCX-8), initially claimed that Dunn was discharged for doing faulty wiring work at the Wal-Mart and Saratoga Golf Course jobsites. Yet, in its December 26, 2003 answer to the complaint, the Respondent asserted, as an affirmative defense, that the alleged discriminatees, which would include Dunn, were "laid off" and "disciplined" for "nondiscriminatory economic reasons, but made no mention of Dunn being discharged for cause. However, in the July 12, 2004, letter to the Regional Director requesting the deposition of Rai, the Respondent's former counsel, Avakian, as noted, proffered yet another explanation for why Dunn and the other alleged discriminatees were discharged, e.g., because they had engaged in "fraudulent time card practices." Where, as here, an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997); *Trader Horn Of New Jersey, Inc.*, 316 NLRB 194, 199 (1995).

I do not, in any event, find credible the discharge explanation set forth in GCX-8. GCX-8, as noted, accuses Dunn of improperly doing the wiring work at the Wal-Mart and Saratoga Golf Course jobsites. However, regarding the Saratoga jobsite, Dunn testified, without contradiction, that while he was initially sent out to work on a security system, when he got there he realized that the work called for someone with greater experience, that he then called the office and recommended that someone else be sent to do the work, and that another employee, Brian Sweet, was in fact sent to do, and completed, the job. This apparent inconsistency between Dunn's testimony that he did not do the wiring work at the Saratoga jobsite, and the assertion in GCX-8 that Dunn had improperly wired a security panel at that jobsite requiring that another technician be sent out to correct Dunn's work, might easily have been cleared up had documentary evidence, such as Respondent's own work records, or other testimonial evidence, been produced to show who may have been assigned and/or actually did the work at that jobsite. No such evidence, however, was produced. Nor was any evidence produced to dispute Dunn's denial of the claim in GCX-8 that Dunn received a warning for his alleged poor performance at the Saratoga jobsite.

GCX-8's further claim that Dunn failed to properly install conduit wiring at the Wal-Mart jobsite was also denied by Dunn. Dunn, as noted, testified that he and K. Kiefner did the wiring work at the Wal-Mart jobsite which involved installing a "power pole,"[13] that the work was done properly, and that he was never told otherwise by management. His testimony in this regard, like his testimony regarding the Saratoga jobsite, was not challenged or disputed at the hearing, nor contradicted by documentary evidence. In fact, Dunn's testimony, and that of other employees who were at the July 7, meeting, that Aldi, Jr. expressed satisfaction with, and/or praised Dunn's work as "great" (Goodsill's and D. Kiefner's testimony) or as "good" (K. Kiefner's testimony), undermines the assertions made by the Respondent in GCX-8 that Dunn's work at these two projects had been unsatisfactory. I therefore credit Dunn's uncontradicted testimony and find, particularly in light of the fact that the Respondent has proffered other reasons for discharge, that the reasons cited in GCX-8 for discharging Dunn are nothing more than pretexts designed to hide the fact that Dunn, as threatened by Aldi, Jr. during the July 7, meeting, was

[13] Dunn testified that while there, he and K. Kiefner went over the entire electrical system to ensure it was okay, and that in the process, they reinstalled an electrical subpanel that had become loose.

discharged because of his involvement with the Union. Accordingly, as the Respondent has failed to rebut the General Counsel's prima facie case, I find that Dunn's discharge was indeed unlawful and a violation of Section 8(a)(3) and (1) of the Act.

b. Goodsill's discharge

Goodsill, one of the six employees who signed a union authorization card on July 3, was as noted, discharged on July 14. The General Counsel, I find, has made a prima facie showing that Goodsill was discharged for his union activities. As shown above in connection with Dunn's discharge, there is ample evidence in the record of the Respondent's antiunion animus. Further, according to statements contained in the Rai deposition, which were not challenged at the hearing, Aldi, Jr., as found above, learned that Goodsill had signed a union card on or soon after July 8. This fact, together with the timing of Goodsill's discharge soon after he signed a union card, and the inconsistent and shifting explanations given for the discharge, support a finding that the Respondent was fully aware of Goodsill's involvement with the Union when it fired him on July 14.

The Respondent, as noted, has proffered different reasons for Goodsill's discharge. In its July 14, discharge letter, for example, it implicitly avers that Goodsill was a supervisor by claiming that Goodsill was fired for his "inability to perform supervisory and management tasks," and for causing, through his alleged mismanagement, "costs overruns" to occur. At the hearing, Goodsill denied, without contradiction, that he was ever a supervisor or manager, or that he possessed any of the indicia of supervisory authority set forth in Section 2(11) of the Act.[14] The burden of establishing supervisory status rests on the party asserting it, in this case the Respondent. *Armstrong Machine Company, Inc.*, 343 NLRB No. 122, at fn. 4 (2004); *Michigan Masonic Home*, 332 NLRB 1409 (2000). Other than the vague reference in the discharge letter to Goodsill's "inability to perform supervisory and management tasks," no evidence was produced at the hearing to show what, if any, supervisory functions or duties Goodsill may have exercised and/or possessed while employed by the Respondent. If anything, the evidence, more particularly Goodsill's unrefuted testimony, suggests the contrary. Any lack of evidence in the record is construed against the party asserting supervisory status. *Armstrong Machine Company, supra*, Conclusionary or vague statements, such as those contained in the July 14, letter suggesting that Goodsill may have been a supervisor, are simply not sufficient to establish supervisory authority. *Id*. Accordingly, I find that Goodsill was not a statutory supervisor when he was discharged on July 14, and that the allusion to him as such in the July 14, discharge letter was nothing more than an attempt by the Respondent to cover up the real reason for Goodsill's discharge, e.g., his union activity.

The Respondent's claim in the July 14, letter that Goodsill was fired for poor supervisory performance and for "costs overruns" is further undermined by the fact that, as previously discussed, the Respondent, in its answer to the complaint and in its July 14, 2004, letter requesting Rai's deposition, gave different reasons for Goodsill's discharge. As noted, in its answer, the Respondent claimed that it had "nondiscriminatory economic reasons for laying off and disciplining [the] employees" named in the complaint, and in its July 14, 2004, letter to the Region, averred that all of the alleged discriminatees named in the complaint, which would include Goodsill, were fired for engaging in "fraudulent time card practices." In neither

[14] Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action…."

document did the Respondent contend that Goodsill was a supervisor who had been terminated for his "inability to perform supervisory and management tasks," as stated in the July 14, discharge letter to Goodsill. These shifting explanations give rise to a reasonable inference that the reason cited by the Respondent in its July 14, discharge letter is nothing more than a pretext. Accordingly, I find that the Respondent has not provided a legitimate, nondiscriminatory reason for discharging Goodsill. Having failed to rebut the General Counsel's prima facie case, a finding is warranted that Goodsill was unlawfully discharged for his union activity in violation of Section 8(a)(3) and (1) of the Act.

c. K. Kiefner's discharge

K. Kiefner, who signed a union card on July 3, was fired ten days later, on July 13. The record makes clear that by July 8, the Respondent was fully aware that K. Kiefner had signed a union card. Thus, on July 8, after Rai purportedly admitted to Aldi, Sr. that he had signed a union card, Aldi, Sr., an agent of the Respondent, approached K. Kiefner and asked if he had signed a card. K. Kiefner replied that he had. Further, as evident from his deposition and as found above, on July 8, Rai disclosed to Aldi, Jr. that he, K. Kiefner, and several others had signed authorization cards for the Union on July 3. There is no question, therefore, and I find, that the Respondent had knowledge of K. Kiefner's involvement with the Union before firing him on July 13. The various acts of unlawful conduct engaged in by the Respondent herein, including coercive interrogations and threats to discharge union supporters, and its carrying out of those threats through the discharge of Dunn and Goodsill, provide ample evidence of its antiunion animus. On these facts, I find that the General Counsel has made a strong prima facie showing that K. Kiefner's discharge, like that of Dunn and Goodsill, was also motivated by antiunion considerations.

The Respondent has proffered no explanation for discharging K. Kiefner on July 13. Thus, unlike Dunn and Goodsill, the Respondent did not provide K. Kiefner with a written document setting for its purported reason for the discharge. Nor was any such explanation presented at the hearing, for the Respondent, as noted, chose not to participate. In fact, the only evidence regarding his termination came from K. Kiefner himself. K. Kiefner's testimony, however, strongly suggests that Aldi, Jr.'s reason for firing him was related to his union involvement. According to K. Kiefner, on July 13, Aldi, Jr. simply showed up at his door and, without explaining, told K. Kiefner he was fired. His subsequent inquiry of K. Kiefner about how the latter could have done this to him, and his threat to file criminal charges against K. Kiefner if he did not tell the Union to back down, clearly establishes, particularly in the absence of any other explanation from the Respondent, that K. Kiefner was indeed fired for his union activity. Having failed to come forth with any lawful explanation for discharging K. Kiefner, the Respondent has not rebutted the General Counsel's prima facie. Accordingly, K. Kiefner's discharge is found to have been unlawfully motivated by his union activity, in violation of Section 8(a)(3) and (1) of the Act.

I further find, as alleged in the complaint, that the Respondent unlawfully discriminated against K. Kiefner by refusing to assign him to prevailing wage rate jobs because of his involvement with the Union. Thus, D. Kiefner, as noted, testified, credibly and without contradiction, that during their July 10, conversation, Aldi, Jr. readily admitted that he reduced K. Kiefner's salary from $19./hour to $17./hour, and stopped sending him to prevailing wage jobs because he believed K. Kiefner was involved with the Union. By retaliating against K. Kiefner for his union activities by not sending him on prevailing wage job assignments, the Respondent,

I find, further violated Section 8(a)(3) and (1) of the Act.[15]

d. D. Kiefner's discharge

Aldi, Jr., as found above, fired D. Kiefner at her home on July 13, shortly after notifying her son, K. Kiefner of his termination. The complaint alleges that her discharge was motivated by antiunion considerations. Unlike the other alleged discriminatees, there is no evidence in the record to show that D. Kiefner signed a Union card or took part in Union activity prior to being discharged. Still, the events and circumstances preceding her discharge, including the discussion she had with Aldi, Jr. on July 10, and the various and inconsistent explanations given by the Respondent for her dismissal, leads me to believe that Aldi, Jr. terminated D. Kiefner because of her familial relationship with K. Kiefner, a union supporter.

Aldi, Jr., as noted, learned of K. Kiefner's involvement with the Union on or around July 8. In his July 10, discussion with D. Kiefner regarding K. Kiefner's involvement with the Union, Aldi, Jr. sought to have D. Kiefner reveal what she knew of her son's union activity by unlawfully interrogating her. When she declined to answer his questions and suggested he question K. Kiefner directly, Aldi, Jr., in what I suspect was an angry tone, revealed his intent to terminate K. Kiefner and other union supporters as soon as he could find some pretextual reason for doing so. While Aldi, Jr.'s animosity extended to all union supporters, his decision to reduce K. Kiefner's wage rate, and to stop sending him on prevailing wage rate assignments, because of his involvement with the Union, leads me to believe that Aldi, Jr. found K. Kiefner's union activity more irksome than that of other employees. There is in this regard no evidence or allegation that any other employee who signed a union card, and who Aldi, Jr. knew to be involved with the Union, received a similar reduction in pay or were denied prevailing wage rate job assignments. I am convinced that it was this personal union-related animosity that Aldi, Jr. harbored towards K. Kiefner, and an apparent mistrust of D. Kiefner because of her close family relationship to K. Kiefner, that prompted Aldi, Jr. to get rid of D. Kiefner at the same time as he was notifying K. Kiefner of his termination. Aldi, Jr., as noted, made clear to D. Kiefner as he was firing her on July 13, that he did not trust her.

That D. Kiefner was fired for other than legitimate reasons is evident from the various inconsistent and unsubstantiated reasons proffered by the Respondent for her termination. According to the discharge letter received by D. Kiefner from Aldi, Jr. on July 28, she was fired purportedly for violating a Company policy prohibiting the personal use of Company stationary and computers. However, as credibly testified to by D. Kiefner, and as found above, the Respondent had no such policy. Further, when he went to D. Kiefner's house on July 13, to notify her and K. Kiefner of their terminations, Aldi, Jr. gave completely different reasons for doing so. Thus, Aldi, Jr. initially told D. Kiefner that she was being fired for not reporting to work on July 11, a reason not cited in the July 28, discharge letter as a basis for his decision.[16] When D. Kiefner protested that she had called in that day, Aldi, Jr. changed his rationale and told her that she was being discharged for allowing employees to see their timecards. This latter explanation, like her failure to show up for work, is likewise not mentioned in the July 28, letter as a grounds for the discharge. Further, as discussed above in connection with the discharge of the other discriminatees, the Respondent, in its answer to the complaint and in its July 14, 2004, letter requesting Rai's deposition, proffered still other reasons for discharging D.

[15] Only the refusal to assign K. Kiefner to prevailing wage job assignments, not the $2/hour reduction in his salary, is alleged in the complaint to be unlawful.

[16] Although the July 13, discharge letter makes reference to her absence from work on July 11, it does not cite her failure to report for work that day as a reason for the discharge.

Kiefner. Thus, in its answer, the Respondent, as noted, asserts as an affirmative defense that the discharge of D. Kiefner and the others was motivated by economic reasons, and in its July 14, 2004, letter, that she along with the other discriminatees were discharged for fraudulent use of their timecards.

In sum, the Respondent has not provided a consistent explanation for discharging D. Kiefner, and has in fact proffered five very different reasons for doing so, none of which, incidentally, finds evidentiary support in the record. It is patently clear, and I so find, that the various explanations proffered by the Respondent for discharging D. Kiefner are mere pretexts. I am convinced that it was D. Kiefner's familial relationship to K. Kiefner, a union supporter, and not any of the various discredited and unsubstantiated explanations proffered by the Respondent, that led to her termination. Accordingly, D. Kiefner's termination is found to have been unlawful and a violation of Section 8(a)(3) and (1) of the Act. *Waterbed World*, 286 NLRB 425, 428 (1987).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities, threatening to file criminal charges against an employee if he did not agree to provide information about the union activities of other employees, and threatening to discharge employees who engaged in union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By refusing to assign employee Kim Kiefner to prevailing wage rate jobs, and by thereafter discharging Kim Kiefner, Patrick Dunn, Francis Goodsill, and Diane Kiefner for supporting the Union and to discourage others from joining or supporting the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful discharge of employees Patrick Dunn, Francis Goodsill, Kim Kiefner, and Diane Kiefner, the Respondent shall be required to, within 14 days from the date of the Order, offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall also be required to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As to Kim Kiefner, the Respondent shall be ordered to make him whole for any losses he may have

sustained resulting from its refusal to assign him to prevailing wage rate jobs, with interest, in accordance with *F.W. Woolworth Co.*, supra, and *New Horizons for the Retarded*, supra.. The Respondent will also be required, within 14 days from the date of the Order, to remove from its files any and all reference to the unlawful discharge of Patrick Dunn, Francis Goodsill, Kim Kiefner, and Diane Kiefner, and, within 3 days thereafter, to notify them in writing that this has been done and their unlawful discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Aldi Electric, Inc., Schenectady, NY, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about their union activities, threatening to discharge employees for engaging in such activities, and threatening to file criminal charges against them if they agree to solicit information about its employees' union activities.

(b) Refusing to assign Kim Kiefner to prevailing wage rate jobs and discharging him and employees Patrick Dunn, Francis Goodsill, and Diane Kiefner for engaging in union activities or to discourage them from engaging in such activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer Kim Kiefner, Patrick Dunn, Francis Goodsill, and Diane Kiefner reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Kim Kiefner, Patrick Dunn, Francis Goodsill, and Diane Kiefner whole for any losses they may have sustained resulting from their unlawful discharge, and make Kim Kiefner whole for any losses suffered due to the Respondent's refusal to assign him to prevailing wage rate jobs, with interest as set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Order, remove from its files any reference to the unlawful discharges , and in the case of Kim Kiefner, any further reference to its unlawful refusal to refer him to prevailing wage rate jobs, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and/or refusal to refer them to prevailing wage rate jobs will not be used against in any way.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board of its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Schenectady, NY copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

George Alemán
Administrative Law Judge

[18] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union support or activities, WE WILL NOT threaten to discharge you because of union activities; and WE WILL NOT threaten to file criminal charges against you in order to coerce you into soliciting information about the Union activities of other employees.

WE WILL NOT refuse to refer you to prevailing wage rate jobs because of your union activities, and WE WILL NOT discharge you for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Dunn, Francis Goodsill, Kim Kiefner, and Diane Kiefner full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, with interest.

WE WILL make Patrick Dunn, Francis Goodsill, Kim Kiefner, and Diane Kiefner whole for any loss of earnings and other benefits resulting from our discrimination against them, and WE WILL further make Kim Kiefner whole for any loss of earnings and other benefits he may suffered due to our refusal to refer him to prevailing wage rate jobs, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Patrick Dunn, Francis Goodsill, Kim Kiefner, and Diane Kiefner, and any reference to our unlawful refusal to refer Kim Kiefner to prevailing wage rate jobs, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that our unlawful actions will not be used against them in any way.

ALDI ELECTRIC, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Room 901, Buffalo, New York 14202–2387, Telephone 716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202–2387, Telephone 716–551–4951.